

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 20, 2001 SESSION

STATE OF TENNESSEE v. JAMES ELBERT TAYLOR, JR.

Appeal from the Criminal Court for Sumner County
No. 641-1999 Jane W. Wheatcraft, Judge

No. M2000-01802-CCA-R3-CD - Filed September 7, 2001

The Defendant, James Elbert Taylor, Jr., was convicted for the aggravated burglary, aggravated kidnapping, and aggravated assault of his estranged wife, Jennifer Albert. The trial court sentenced the Defendant to four years for the aggravated burglary, ten years for the aggravated kidnapping, and three years for the aggravated assault. The court further ordered that the sentences run consecutively to each other and to Defendant's previous conviction in Louisiana. The Defendant raises these issues on appeal: 1) the trial court erred by allowing evidence of Defendant's prior case in Louisiana, which was not relevant under Rule 404; 2) the trial court erred by ruling that the Defendant could be impeached, under Rule 609, with proof of a conviction for attempted manslaughter in Louisiana; and 3) the trial court erred in ordering consecutive sentencing without making specific findings under Tenn. Code Ann. § 40-35-115. After review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J. and TERRY LAFFERTY, Sp.J., joined.

Randy P. Lucas, Gallatin, Tennessee, for the appellant, James Elbert Taylor, Jr.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Smith, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; Ron Blanton, Assistant District Attorney General; and Cara Loeffler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On the morning of May 20, 1999, Jennifer Albert, the victim and the Defendant's estranged wife, was walking out the door of her apartment, when the Defendant attacked her and pushed her back into the apartment. (At the time of this incident, the victim was in the process of obtaining a divorce from the Defendant). The Defendant locked the deadbolt on the door and pulled out a knife as he began to "rant and rave" at the victim. The victim testified that she was afraid and that she explained to the Defendant that she had to go to work. However, the Defendant continued his angry

behavior and told the victim that “he should have killed [her], like he should have done that bitch, Kim.” The victim pleaded with the Defendant and asked him not to leave her daughter motherless. (The victim’s daughter was staying with friends on the day of this incident.) The Defendant held the victim for approximately one and one-half hours. During this time, the Defendant threatened to kill the victim, poked her in her chest, injured her shoulder as she was trying to escape, grabbed her by the arms, and pushed her. At one point, the victim became ill and threw-up. Also, the victim testified that she had sex with the Defendant out of fear that he would harm her if she refused. The victim stated that she had not had consensual sex with the Defendant, since December of 1998. After having intercourse with the Defendant, the victim convinced the Defendant that, if he let her go to work, then she would not tell anyone about what had happened. The Defendant told the victim that he would kill her if she notified anyone about this incident.

The victim got in her car and drove approximately two blocks to her job at Hendersonville Hospital, where she worked as a surgical scrub technologist. She proceeded to her work and tried to pretend that she was alright. At some point, she was able to speak with Beth Bean, her immediate supervisor, and describe how the Defendant had attacked her earlier that morning. Bean testified that, when she saw the victim, the victim “was upset, shaking and trembling, [and] crying.” She further stated that the victim complained of left shoulder pain, had scratches on her neck, a cut on her hand, and blood on her lab coat. Bean took the victim to the director’s office, and eventually, the victim was taken to the emergency room. The victim was treated for the cuts on her hand, given a tetanus shot, medicine for pain and a prescription for anxiousness. Later, the police were called and Officer Newberry arrived to get a report from the victim. Afterwards, Mary Guldeman, the victim’s co-worker and good friend, took the victim to obtain an order of protection. Then, the victim was taken back to her apartment to gather some personal items, so that she and her daughter could stay with the Guldemans for three or four days. Mary Guldeman testified that, while they were at the victim’s apartment, she “noticed some papers on the floor and greasy, dirty skid marks by the front door.” Guldeman stated that she knew the victim to be “an immaculate housekeeper.” The victim explained that the marks were where the Defendant “had entered and slid across the floor chasing her.”

At this point, the State rested its case-in-chief. The Defendant made a motion for judgment of acquittal, which the trial court denied. The Defendant declined to testify, after examination by the trial court, due to the trial court’s ruling that evidence surrounding his prior conviction in Louisiana would be admissible to impeach the Defendant. The Defendant stated that he did not want to be subject to impeachment and questioning related to the guilty plea for attempted manslaughter he entered in Louisiana. The jury returned a verdict of guilty on all three counts of the indictment. This appeal followed.

ANALYSIS

I. Admissibility Of Louisiana Conviction Under Tennessee Rules of Evidence 609

The Defendant contends that the trial court erred by ruling that, if he testified, he could be impeached by proof of a guilty plea he entered in Louisiana in 1993 for attempted manslaughter. The

Defendant argues that the guilty plea was not a conviction, because the trial judge in Louisiana had not sentenced him or entered a final judgment. He concedes that the attempted manslaughter is a prior bad act. However, he asserts that the attempted manslaughter was a crime of violence and not of dishonesty. He also argues that given the similarity between the Louisiana conviction and the offense charged, the admission of the prior conviction would only be propensity evidence, and be unfairly prejudicial. The record shows that the Defendant left Louisiana after entering a guilty plea for the attempted manslaughter of his ex-girlfriend, and he was on fugitive status in Louisiana.

Initially, we note that the Defendant's reliance upon Rule 32 (e), Tenn. R. Crim. P., is misplaced. Rule 32 (e) sets forth the required contents of a judgment of conviction and the method for entering such a judgment. However, this rule provides no guidance for our determination of whether the Defendant's guilty plea was a "conviction" for purposes of impeachment. Moreover, we find that, under Tennessee law, Defendant's guilty plea was a conviction for impeachment purposes. The Defendant's case is similar to the situation in which a trial court permits the State to use a defendant's conviction to impeach credibility, even though that conviction is pending on appeal. See McGee v. State, 332 S.W.2d 507, 508-09 (Tenn. 1960) (holding that trial court's admission of defendant's prior conviction, for impeachment purposes, did not constitute error, though an appeal was pending from that prior conviction). In this case, a final judgment had not been entered against the Defendant, because the Defendant absconded and failed to return to Louisiana for his sentencing, after being permitted to return to Tennessee to work. A transcript of a phone conference between the trial court and the Louisiana trial judge, with counsel present, indicated that the judge had accepted the Defendant's plea of guilty to attempted manslaughter, and the plea agreement capped the Defendant's sentence at ten years. The Louisiana judge stated that the only remaining steps were the sentencing of the Defendant and the entrance of a final judgment. We find that the trial judge in this case correctly ruled that the Defendant's guilty plea was a conviction.

Next, in addressing the issue before us, we look to Tennessee Rules of Evidence 609, which sets forth several conditions which must be satisfied before the State can use a judgment of conviction to impeach a Defendant. The pertinent conditions are as follows:

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Tenn. R. Evid. 609(a)(2)-(3). In determining whether the probative value of a prior conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues, a trial court should (a) “assess the similarity between the crime on trial and the crime underlying the impeaching conviction” and (b) “analyze the relevance the impeaching conviction has to the issue of credibility.” State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App. 1992); Neil P. Cohen et al., *Tennessee Law of Evidence* § 609.9, at 376 (3d ed. 1995). “The standard is not whether there is *any* prejudice to the defendant by allowing the state to use the prior conviction for impeachment, but whether the possible prejudice is outweighed by the probative value of the evidence as to the defendant’s credibility as a witness.” State v. Roberts, 943 S.W.2d 403, 408 (Tenn. Crim. App. 1996) (*italics in original*). On appeal, a trial court’s ruling under Rule 609 will not be reversed absent an abuse of discretion. See State v. Blanton, 926 S.W.2d 953, 960 (Tenn. Crim. App. 1996).

Prior to trial, the Defendant filed a motion in limine to have evidence of his prior acts and conviction from Louisiana excluded from the trial. Subsequently, the trial court denied the Defendant’s motion. The findings of the trial court were not provided in the appellate record. However, the trial court’s order denying Defendant’s motion in limine was included in the record, and states:

ORDER

THIS CAUSE is before the Court this the 17th day of March, 2000 upon a DEFENDANT’S MOTION IN LIMINE TO EXCLUDE PRIOR ACTS OF MISCONDUCT.

IT IS THEREFORE, ORDERED by the court that the MOTION IN LIMINE TO EXCLUDE PRIOR ACTS OF MISCONDUCT BY THE DEFENDANT is DENIED for reasons set out on the record.

This the 17th day of March, 2000.

/S/
JANE W. WHEATCRAFT
CRIMINAL COURT JUDGE

The record also contains a transcript of the motion in limine held on March 16, 2000, which reflects the arguments made for and against the admissibility of this evidence. At the end of that motion, the trial court stated that it would provide the parties with its ruling either by the end of the day or as quickly as possible. Yet, those findings are not provided in the record on appeal. From the language in the trial court’s order, it appears that another hearing was held, at which time the trial court stated its ruling on the record. The Defendant has not provided us with the record of that hearing. Therefore, we are unable to make a determination as to whether the trial court abused its

discretion, because the appellate record presented for our review is inadequate and fails to provide sufficient information for this Court to thoroughly review this issue.

The appellant has the burden to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the findings of the trial court are correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). The lack of a complete record presents us from determining whether the trial court abused its discretion in this case. Therefore, the Defendant has waived the right to a review of this issue.

II. Admissibility Of Louisiana Conviction Under Tennessee Rules of Evidence 401 and 404(b)

The Defendant also challenges the trial court's reliance upon Rules 401 and 404(b), Tenn. R. Evid., to admit certain statements made by the Defendant to the victim, during commission of the offenses. The Defendant contends that, even if this evidence was relevant, the probative value was outweighed by the danger of unfair prejudice. At trial, the victim testified as follows:

Q [Prosecutor]. What happened once he made it into the door and locked you in?

A [victim]. He was just ranting and raving. He had told me -- well, I, when he came in, "What are you doing here? You need to get out," because I didn't have time for that. I had to be at work. I wasn't wanting to argue with him.

He was like, "Talk shit now, bitch," and was referring to that he should have killed me, like he should done to that bitch, Kim.

Q. Did you know what he meant?

A. Yeah.

(emphasis added). Defendant's objection is to the emphasized portion of the testimony. However, we find that the appellate record presented for our review is inadequate and fails to provide sufficient information for this Court to thoroughly review this issue. As stated above, the trial court's findings were not included in the record. The Defendant has not carried his burden of providing a complete and accurate record of the trial court proceedings with respect to this issue. Tenn. R. App. P. 24(b). Therefore, this issue is also waived and we presume that the trial court's ruling was correct. Oody, 823 S.W.2d at 559.

Nonetheless, we note that this testimony did not provide the jury with any evidence of the Defendant's prior Louisiana conviction. The victim's testimony merely addressed the Defendant's ill intentions toward the victim and another woman named Kim. The jury was not made aware of the details surrounding the Defendant's attack on Kim. Therefore, we find that this statement did not unfairly prejudice the Defendant. The Defendant is not entitled to relief on this issue.

III. Sentencing

The Defendant's final issue challenges the sentence imposed by the trial court in this case. He argues that the trial court erred in ordering him to serve the sentences imposed for this incident consecutively to each other, as well as consecutively to his Louisiana conviction for attempted manslaughter, which he contends is not a conviction. He further asserts that the trial court failed to follow the mandates of Tenn. Code Ann. § 40-35-115, and erroneously found him to be a dangerous offender under subsection 40-35-115(b)(4).

When a defendant challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. § 40-35-401(d). We condition the presumption of correctness "upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). "[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence." State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994). The burden of showing that a sentence is improper is on the appealing party. Tenn. Code Ann. § 40-35-401(d) (sentencing commission comments). In reviewing the record, this court must consider (a) the evidence at the trial and the sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel, (e) the nature and characteristics of the offenses, and (f) the appellant's potential for rehabilitation. See Tenn. Code Ann. § 40-35-210; see also Tenn. Code Ann. § 40-35-102 & 103.

In the case sub judice, the trial court found that the Defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. Tenn. Code Ann. § 40-35-115(b)(4). However, when a trial court uses this factor, it must also decide whether consecutive sentences (1) reasonably relate to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). Regarding consecutive sentencing, the trial court stated the following:

Now, the Court has to determine whether the sentences should be served consecutively or concurrently, and there are certain things, by statute, that this Court has to look at in determining whether I think consecutive sentencing is proper. The

defendant has been convicted of more than one criminal offense. Also, the Court finds, by a preponderance of the evidence, that this particular defendant is a dangerous offender, whose behavior indicates little or no regard for human life, and he has no hesitation about committing a crime to which risk to human life is high. This is the second very, very serious assault that this defendant has committed.

The assault in Louisiana, to which he pled guilty of attempted manslaughter, was horrendous. The victim was hurt very, very badly. This defendant pled guilty. He did not return to the Court to be sentenced. Instead, he just fled the jurisdiction and came to Tennessee. I guess, now he is in the status of a fugitive from justice from the State of Louisiana.

Then he comes up here and gets convicted of two C and B felonies; again, crimes against persons, or a crime against a person, and the circumstances, again, are extremely serious.

I think that since he has been convicted of two or more offenses, that I do find him to be a dangerous offender under section (4); that while his criminal activity is not extensive, it certainly is serious in the nature of the offenses that he has committed. And I find that the aggregate length of all these sentences, when I run them consecutively, is reasonably related to the severity of the offenses for which he has been convicted.

While the trial court may not have explicitly stated the Wilkerson factors as outlined by the Tennessee Supreme Court, we are able to glean from the above language that the trial court properly considered the factors in Wilkerson. The trial court determined that the sentences imposed in this case should run consecutively, because this is the second offense of this nature that the Defendant has committed, which addresses the need “to protect the public from further criminal conduct by the offender.” The trial court also found that the length of the sentences “reasonably related to the severity of the offenses.” Finally, the trial court considered general sentencing principles when it determined that the serious nature of the offenses justified this extensive sentence. An exhibit of the guilty plea hearing in Louisiana shows that the Defendant pled guilty to the attempted manslaughter of his girlfriend, who he dragged into a ditch, “punched in the face,” and pounded her in the head with a hammer. Therefore, this offense is the second time the Defendant has used a deadly weapon. Furthermore, the presentence report showed that the Defendant was on fugitive status in Louisiana, because he failed to return for his sentencing hearing. The record shows that the trial court followed the sentencing principles and properly ordered the Defendant to serve the sentences in this case consecutively.

Additionally, we find that the trial court did not err in ordering the Defendant to serve the sentences in this case consecutively to his sentence in Louisiana. Tennessee Rules of Criminal Procedure 32(c)(2) provides, in pertinent part, that:

If the defendant has additional sentences or portions thereof to serve as a result of a conviction in *other states* or in federal court, the sentence imposed *shall be consecutive* thereto, unless the Court shall determine, in the exercise of its discretion, that good cause exists to run the sentences concurrently and explicitly so orders.

(emphasis added). This rule requires the Defendant to serve his Tennessee sentence consecutive to his Louisiana sentence, unless the trial court exercises its discretion to order the sentences to run concurrently. There was no abuse of discretion by the trial court. Therefore, the Defendant is not entitled to relief on this issue.

CONCLUSION

Based upon our review of the record, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE